(30)

HIGH COURT OF CHHATTISGARH AT BILASPUR

CRIMINAL APPEAL NO.573 OF 2001

APPELLANTS (Accused in Jail) — Lakshmi Narayan Mishra & another

Vs

RESPONDENT — The State of Chhattisgarh.

CRIMINAL APPEAL NO. 772 OF 2001

APPELLANT — Sheshnath Tiwari

Vs

RESPONDENT — The State of Chhattisgarh

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JUDGMENT FOR CONSIDERATION

Sd/-
DHIRENDRA MISHRA
Judge

HON'BLE MR. L.C.BHADOO, J

Sd/-
L.C.BHADOO
Judge

POST FOR JUDGMENT ON 24th JULY, 2007

Sd/-
JUDGE
24.07.2007

HIGH COURT OF CHHATTISGARH AT BILASPUR

DIVISION BENCH: HON. MR. L.C. BHADOO &
HON. MR. DHIRENDRA MISHRA, JJ

CRIMINAL APPEAL NO.573 OF 2001

APPELLANTS
[Accused in Jail]

1. Lakshmi Narayan Mishra, S/o Byash Mishra, aged 20 years, Occupation Betel Shop.
2. Sanjay Kumar Pandey, S/o Brajnath Pandey, aged 20 years, Occupation Betel Shop.

Both residents of Saraipali, Mohalla Mahalpara, P.S. & Tahsil Mahalpara, District Mahasamund.

Vs

RESPONDENT — The State of Chhattisgarh, through the District Magistrate, Mahasamund.

CRIMINAL APPEAL NO.772 OF 2001

APPELLANT — Sheshnath Tiwari, S/o Shri Brij Bihari Tiwari, aged 30 years, R/o Saraipali, Mahalpara, P.S. & Tah. Mahalpara, District Mahasamund.

Vs

RESPONDENT — The State of Chhattisgarh, through the Station House Officer, P.S. Saraipali, Mahasamund.

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Present:

Mr. S.R.J. Jaiswal, Advocate for appellants in Cr. A. No.573/01.

Miss Nirupama Bajpai, Advocate for appellant in Cr. A. No.772/01.

Mr. Sudhir Bajpayee, Dy. Govt. Advocate for the State in both the appeals.

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**JUDGMENT**
**(Delivered on 24.7.2007)**

**Per Dhirendra Mishra, J:**

1. Criminal Appeal No.573/2001 & Criminal Appeal No.722/01 are being decided by this common judgment, as both these appeals are arising out of the judgment dated 28.6.2001 passed by learned 1st Additional Sessions Judge, Mahasamund in Sessions Trial No.146/2000 whereby learned Additional Sessions Judge convicted the appellants under Sections 148 & 302/149 for causing death of Vidhyawati, under Section 302/149 of IPC for causing death of Vindhyachal Mishra and also under Section 323/149 of the IPC for causing injuries to Pawan Mishra and sentenced each of the accused person to undergo R.I. for one year; imprisonment for life and to pay a fine of Rs.5,000/-, in default of payment of fine to further undergo R.I. for two years, imprisonment for life and to pay a fine of Rs.5,000/-, in default of payment of fine to further undergo

R.I. for two years & R.I. for one year respectively. It has been further directed that all the sentences shall run concurrently.

2. Case of the prosecution, in brief, is that on 7.2.2000 around 20.00 hrs in the night when Vindhyachal Mishra (since deceased) was sitting in the kiosk after taking betel, accused Ramanand & Laxminaryan @ Chunchun came from bus stand side and picked-up quarrel with Vindhyachal in relation to some old animosity. However, all the three went to their respective houses. When at about 9.00 p.m. accused Ramanand, Sheshnath, Shashibhusan, Laxminarayan & Sanjay were preparing for cooking fish in their tenanted house, at that time Vindhyachal came to their house and challenged them, whereupon accused Ramanand holding flat iron plate (patta) and other four holding Danda together attacked Vindhyachal and caused him grievous injuries. Vindhyachal shouted for rescue, on which his wife Vidhyawati (since deceased) came to rescue him, however, accused persons assaulted her also and caused her grievous injuries. Their sons namely Vishnu & Pawan also reached their, whereupon Pawan was also assaulted. Vindhyachal & Vidhyawati were taken to the hospital in unconscious condition and they died in the Medical College Hospital, Raipur.

3. Report of the incident was received on telephone at 21.15 hrs, which was recorded in the Róznamchasanha at Sr. No.308 dated 7.2.2000 (Ex.P-27) and constables were sent to the place of incident. Vishnu (PW-6) also gave information at about 21.25 hrs, which was also recorded in the Roznamchasanha at Sr. No.309 vide Ex. P-28. Offence was registered under Sections 147, 148, 307 & 323 of IPC vide Dehati Nalishi of Ex.P-6 on the information of Vishnu (PW-6) at 22.15 hrs on 7.2.2000. Vidhyawati was sent for medical examination to the Community Health Centre, Saraipali where Dr. B.A. Koshariya (PW-16) examined her and gave the injury report of Ex.P-23. Vindhyachal was also sent for medical examination to the Community Health Centre where Dr. B.A. Koshariya examined him and gave his report of Ex.P-24.

4. On the basis of information received from Constable Ali Mohammed that Vidhyawati died at about 5.50 a.m. on 8.2.2000 and Vindhyachal died at 2.00 p.m. in the afternoon on 9.2.2000 the merg intimation of Ex.P-21 was recorded. On the basis of information of constable Prakash Chandra at 22.40 hrs FIR (Ex.P-20) was recorded. Inquest over the bodies of deceased persons were prepared in the presence of the witnesses after due notice to them vide Ex.P-7 & P-9. Their bodies were sent for autopsy to Medical College Hospital, Raipur where Dr. Ulhaas Unnade (PW-10)

conducted postmortem and submitted his report of Ex.P-17 & P-18 respectively. Injured Pawan Kumar was also sent for medical examination to Community Health Centre, Saraipali where Dr. R.S. Patel (PW-11) examined him and gave the injury report of Ex.P-19. Accused Sheshnath was also sent for medical examination to Community Health Centre, Saraipali where Dr. R.S. Patel examined him and gave his report of Ex.P-20. Blood stained and plain soil was taken into possession from the place of occurrence under Ex.P-1. Spot map of Ex.P-5 was got prepared by Halka Patwari Shri R.K. Akhade. The Investigating Officer also prepared the site plan (Ex.P-31) of the place of incident. Sealed packets containing blood stained clothing of both the deceased persons received from the hospital were taken into possession vide Ex.P-11. On the memorandum of appellant Laxminarayan @ Chunchun of Ex.P-12, one club was taken into possession vide Ex.P-13 and heavy flat plate (patta) of any vehicle was taken into possession vide Ex.P-14. One lathi was taken into possession from accused Sanjay vide Ex.P-15, another lathi was taken into possession on being produced by accused Sheshnath vide Ex.P-16. Weapons of offence i.e. lathi & iron plate were sent to the doctor of Government Hospital, Saraipali for his report whether the weapons contained blood stained and whether injuries sustained by Vindhyachal & Vidhyawati could be caused by the above weapons vide Ex.P-26A and the report of the doctor is Ex.P-26. Seized articles i.e. weapons of offence, plain soil & blood stained soil and wearing apparels of the deceased persons were sent for chemical examination to the Forensic Science Laboratory, Raipur vide Ex.P-32 and the report of FSL is Ex.P-33.

5. After completion of investigation charge sheet was filed in the Court of Additional Chief Judicial Magistrate, Mahasamund showing accused Ramnarayan Tiwari & Shashibhusan absconding, who in turn committed the case to the Court of Sessions Judge, Raipur and the learned Additional Sessions Judge has received the same on transfer for trial.

6. The prosecution in order to establish the charges against the accused persons examined 18 witnesses in all. Statements of accused persons were recorded under Section 313 of the Cr.P.C. in which they denied the circumstances appearing against them in the prosecution case and stated that they are innocent and have been falsely implicated in the crime.

7. Learned trial court after hearing the counsel for the parties, convicted and sentenced the appellants, as mentioned above.

8. Homicidal deaths of Vindhyachal & Vidhyawati are not in dispute. Even otherwise from the statement of Dr. Ullhas Unnade (PW-10), who has conducted the postmortem over the persons of Vindhyachal & Vidyawati and has found the injuries on their persons described herein below, and who has further opined that deceased Vidhyawati died homicidal death as a result of complication due to head injuries, whereas, Vindhyachal died as a result of complication due to head injuries and the same is homicidal in nature. From the evidence of eyewitnesses PW-6 ~~Vinshy~~ Vishnu & PW-7 Pawan who have seen the appellants assaulting the deceased persons, the homicidal death of Vidhyawati & Vindhyachal is established.

**Injuries over the person of deceased Vidhyawati;-**

- Rigor mortis was present in legs and arms.
- Postmortem staining was present on the back of the body.
- Both the eyes were closed. Cornea hazy, both hands smudge with blood (dry).
- A stitched surgical wound in saggital plane present on left side of skull in the size of 7.5 c.m., wound present 5 cm above mid of left eyebrow. Underneath surrounding skin shows contusion. Fracture present in carnial plane on left temporal region in the size of 7cm. Fracture present on left side and middle cranial fossa.
- A contusion on the back of vault of skull in an area of 3" diameter.
- Multiple abrasion present on dorsum of right elbow and the size varying from 1cm diameter to 0.5 cm irregular.
- Left eye contused.

**Injuries over the person of deceased Vindhyachal;-**

- Surgical stitched wound on the right suprasternal margin in the size of 8cm transverse.
- Surgical stitched wound on right frontal region.
- Surgical stitched wound from midpoint between both suprasternal margin.
- Rail pattern bruise present as anterior aspect of chest, blind end situated on right side and at upper level situated 8cm below suprasternal notch and lateral to midline lowered (open end situated 7cm left lateral to midline. Size 21x1.5cm.
- Rail pattern bruise with upper open end present on xiphi sternum and rest on left side of abdomen, lower blind end situated 5 cm below xiphi sternum and 6cm left lateral to midline. Size 7cm x 2 cm.
- Rail pattern bruise present on left lateral aspect of abdomen with upper open end is on the line of ilace crest 9 cm above and lower blind end situated 4 cm to ilace crest. Size 9.5cm x 0.2cm.
- Abrasion present on anterior aspect of abdomen on left size 8 cm below xiphi sternum & 4 cm left lateral to midline. Size 3x0.5cm transverse irregular.

- Abrasion present on chest left lateral aspect 9cm below ant. Axilliary fold size 9cm x1cm transverse irregular.
- Abrasion present on exterior aspect of left forearm in midline starting from elbow in the size of 7x1cm vertical irregular.
- Abrasion present on exterior aspect of left forearm 8 cm below the elbow in midline in the size of 3x0.5cm transverse irregular.
- Multiple abrasion present on anterior aspect of both knees.
- Rail pattern bruise present on back side situated 22cm below cervical vertebra.
- Abrasion present on left side of back situated 32cm below cervical vertebra and 12 cm left lateral midline. Size 2.5cm diameter irregular

9. Learned counsel for the appellants submitted that the appellants have been convicted in the aforesaid offence with the aid of Section 149 of the IPC. The appellants have also been convicted under Section 148 of the IPC for rioting with deadly weapon. However, from perusal of the prosecution case itself it would be evident that deceased Vindhyachal was the aggressor, who went to the house of accused persons and challenged them and as such quarrel was initiated by him. The place of incident is near the tenanted house of the accused persons and there is no evidence available on record that the appellants have formed an unlawful assembly with a common object to cause homicidal deaths of Vindhyachal & Vidhyawati and in the absence of evidence of formation of unlawful assembly by the accused persons they could not be held guilty for any criminal liability. Referring to the statements of Vishnu (PW-6), son of deceased persons, it has been argued that it is evident that firstly oral altercation took place in the betel shop between Vindhyachal & accused persons, thereafter Vindhyachal's wife Vidhyawati went to house of the accused persons and after sometime Vindhyachal also reached there and they were followed by their sons namely Pawan & Vishnu. Similar is the statement of injured witness Pawan (PW-7) who has stated in Para 3 that his father came home, he had some talk with his mother and thereafter his mother went to the spot first, she was followed by his father and after hearing the commotion he along with his brother went to the spot and there they saw the incident. Witness Vishnu (PW-6) has stated that he saw the accused persons assaulting his father & mother. He has further stated that Shashibhusan was holding patta, whereas others were holding rod & lathi. Shashibushan assaulted her mother on her stomach & head. He also assaulted his father over his forehead by that patta. Omnibus allegations have been made by this witness against the appellants and no specific blow has been attributed to them. This

witness has contradicted his diary statement of Ex.D-1 on the material facts that Ramanand assaulted with iron plate. Similarly Pawan Mishra (PW-7) has also stated that Shashibhusan was assaulting his father by iron plate, his father was lying on the ground and rest of the accused persons was assaulting her mother by lathi. This witness has also contradicted his diary statement of Ex.D-2 in which he has stated that Ramanand Tiwari was holding iron plate in his hand and he has assaulted by that iron plate. There was a long drawn enmity between Ramanand Tiwari and deceased Vindhyachal. Except these two highly interested witnesses other witnesses have not supported the prosecution case and they have turned hostile. It was further argued that Visnhu has given information in the police station at about 21.25 hrs, which was recorded in Sanha (Ex.P-28), to the effect that Shashibushan and others are beating his father, but the names of the appellants have not been mentioned. In the inquest report of deceased persons, which has been prepared in presence of Vishnu (PW-6) on 9.2.2000, accused Sanjay & Laxminarayan have not been mentioned by names and the same also does not bear the crime number. Similarly, the requisition for postmortem also does not mention the names of appellant Sanjay & Laxminarayan. Further there is no evidence available on record to show that copy of FIR (Ex.P-20) was forwarded to the concerned Magistrate and the Investigating Officer (PW-18) Shri P.S. Thakur has admitted in Para 23 of his deposition that no document showing the fact that the copy of FIR was sent to the Magistrate has been produced. Dehati Nalishi (Ex.-P-6) is a suspicious document as from perusal of this document it would be evident that the signature of informant was taken on a blank paper and subsequently document was prepared.

10. On the other hand, learned Deputy Government Advocate for the State supported the judgment of the trial court.

11. The conviction of the appellant is based on the evidence of Vishnu (PW-6) & Pawan (PW-7), who are the sons of deceased persons and they have been examined as eyewitnesses. PW-1 Suresh Kumar Kushwaha, PW-2 Loknath Sahu, PW-3 Ganpati & PW-4 Sadananad were also cited as eyewitnesses of the incident however, they have not supported the case of the prosecution and they have turned hostile. They have been cross-examined by the prosecution after declaring them hostile. Version of PW-1 Suresh Kumar Kushwaha, PW-2 Loknath Sahu, & PW-4 Sadananad in their diary statement of Ex.P-2, Ex.P-3 & Ex.P-4 respectively was that at the time of incident at about 9.00 p.m. they saw the deceased Vindhyachal in front of the house of Shashibhusan in

inebriated condition, he was abusing Shashibushan @ Mona and also beating the roof of his house. Vindhyachal and Shashibusan were engaged in physical scuffle, whereupon Ramanand came out with an iron plate and assaulted Vindhyachal. Vidhyawati and her children came there to support them. However, Vidhyawati was also assaulted by Ramanand and other accused persons. They have resiled from their statements and the prosecution has not been able to elicit any incriminating evidence against the appellants in their cross-examination.

12. Vishnu Verma (PW-6), who is the son of the deceased persons, has stated that accused persons who are his maternal uncles were abusing his father on the square. His father narrated this to his mother Vidhyawati after returning home, his mother went to the quarter of accused person, which is situated in Mahalpara, whereupon the accused persons assaulted his mother. His father also reached there and he was also assaulted by them. He along with his brother Pawan went there and saw the accused persons assaulting his father and mother. The accused persons also chased him, whereupon he fled from there and reached the police station. Shashibushan was holding flat iron plate (patta), whereas, others were holding danda and rod. Shashibushan assaulted his mother over her stomach and head by the patta. He had also assaulted his father over his forehead by the same weapon. Other accused persons have beaten them by club. Persons from the neighbourhood gathered, however, he does not know their names. He had narrated the whole incident in the police station and the police accompanied him to the spot including one Journalist namely Rajeev. When they returned the accused persons had already fled after assaulting his parents. Report was recorded in the hospital as his parents were taken to the hospital. His parents were unconscious. He took his parents to Raipur and admitted them in the hospital. However, his mother died at 4.00 a.m., whereas, his father died at about 2.00 p.m. in the afternoon. This witness has also proved the Dehati Nalishi (EX.P-6), inquest report of Ex.P-7 & Ex.P-8 and seizure memo of Ex.P-11. In the cross examination he has stated that the betel Kiosk is 100 yard away from his house, he did not hear the accused persons abusing his father. He has admitted that the house of Suresh (PW-1) where the accused Chunchun & Shahsibushan reside as tenant is some 150 yards away from his home. However, he has denied knowing *Rishikesh Patel*. Place of incident is at some 20-25 feet from the house of Suresh (PW-1). He has denied that he mentioned in his case diary of Ex.P-1 that the incident occurred before the house of *"Rishikesh Patel"*. He has stated that he reached the police station within 1½ to 2

minutes of the incident and informed the police. However, the police did not take his signature and all his signatures were obtained in the hospital. In Para 8 he has stated that Laxminarayan was holding club like weapon, Sanjay was holding bamboo rafter, whereas, Shashibushan was holding flat iron bar of truck and Ramanand was holding club. He has denied having told the police that Ramandand assaulted by iron plate of Ex.D-1. In Para 25 he has further denied that he had assaulted Sheshnath by club and his mother & brother Pawan had bitten him.

13. PW-7 Pawan Mishra has stated that at the time of incident he was in his home and he was giving fodder to his cow. It was night. He along with his brother went to the place of incident and saw his mother & father lying there. He saw from a distance of 25-30 feet Shashibushan assaulting his father by flat iron plate, at that time his father was lying on the ground. Remaining accused persons were assaulting him by club. His mother fell over his father, she was also assaulted by the accused persons. Shashibushan caught hold of hand of his brother and exhorted others to "kill him also", whereupon his brother somehow managed to escape and returned home and proceeded for police station in a bicycle. He also proceeded to police station by another bicycle. He instructed his younger brother to remain in the home. He stayed in the police station, his younger brother was also called in the police station and he was also made to sleep there. The police proceeded to the spot with his elder brother. Before this incident his father had returned and talked to his mother, however, he does not know about the conversation. His mother went to the spot first. He does not know why she went there. His father followed her, after hearing commotion he along with his brother went behind them. The incident occurred in front of the house of Suresh. In the cross examination this witness has also stated that the house of Suresh is at a distance of 150 meter from his house. His father had already fallen on the ground and Shashibushan was assaulting him, whereupon his mother fell on his father, however, he cannot say whether she was also assaulted by the plate or not. However, she had also sustained injuries. In para 9 he has denied the portion "Ramanand Tiwari assaulted with iron plate" of Ex.D-2 and stated that Shashibushan assaulted with plate and he does not know as to how this fact is missing in his diary statement of Ex.D-2. He has further denied that in his diary statement of Ex.D-2 he had mentioned that the incident occurred before the house of "Rishikesh Patel".

14. Learned counsel for the appellants vehemently argued that Dehati Nalishi (Ex.P-6) & FIR (Ex.P-20) are fabricated documents. Names of the

appellants were not mentioned by Vishnu (PW-6) who reached to the police station and informed about the incident immediately at about 9.25 hrs vide Ex.P-28.

15. We propose to examine the genuineness and authenticity of Dehati Nalishi of Ex.P-6 and F.I.R. of Ex.P-20 in the light of arguments advanced by learned counsel for the appellants. After careful examination of the documents available on record we found following anomalies and inconsistencies which have not been explained by the prosecution during trial.

a) Vishnu (PW-6) complainant after narrating the details of incident in para 2 of his deposition has stated that accused persons also chased him, whereupon he ran away and reached the police station. In para 4 he has stated that he narrated the whole incident to the police whereupon the police came to the spot with him and one journalist. By the time they returned the accused persons already fled after assaulting his parents. The police have recorded the information given by Vishnu at 21.25 hrs in the Sanha of Ex.P-28, however, information is to the effect that Shashibushan and others are assaulting his father. Thus, from the document of Ex.P-28 it is evident that this witness did not given any information about the assault by the appellants as also assault on his mother.

b) From close scrutiny of Ex.P-6 particularly the signature of complainant Vishnu we observed that the concluding part particularly the last but one line of the report has been so written that it appears that the same has been written after document was already signed by the complainant. Therefore, we find force in the arguments of learned counsel for the appellants that Dehati Nalishi was written subsequently after obtaining the signature of the complainant over the blank paper.

c) Apart from above, inquest report was prepared on 9.2.2000 in the presence of Vishnu (PW-6) and after interrogation of Vishnu (PW-6). However, in the inquest report of both the deceased persons name of Sheshnath Tiwari, Ramanand, Shashibushan, his brother-in-law and others are mentioned. From perusal of these two documents we infer that by the time these documents were prepared the name of other two accused persons namely Laxminarayan & Sanjay were not available to the Investigating Officer. These documents also do not contain the crime number

though as per the case of the prosecution crime was already registered on 7.2.2000 itself vide Ex.P-20.

d) In the requisition for postmortem report also, which is prepared on 9.2.2000 at about 14.15 hrs, it mention the name of complainant Vishnu (PW-6) as the person who has accompanied the dead body, the name of assailants is mentioned as Sheshnath Tiwari, Ramanand Tiwari, Shashibuhsan & associates and names of accused Sanjay & Laxminarayan are missing.

e) In the FIR of Ex.P-20, which has been recorded on the basis of information given by constable Prakash Chandra, it is mentioned that today on 7.2.2000 at about 9.00 p.m. Shashibushan, Ramanand Tiwari and others have assaulted and injured Vindhyachal and his wife Vidhyawati. Receiving this information he along with Head Constable Nos.31 & 35 gone to the spot, taken the injured persons to the hospital, he brought the Dehati Nalishi for the purpose of registration of offence. From perusal of this document also though in the Column No.7 the name of all the accused persons appears but complainant does not mention the participation of the appellants by name.

f) There is no evidence that copy of FIR was forwarded to the concerned Magistrate, as per Section ~~115~~ 157 of the Cr.P.C.

16. The Hon'ble Apex Court in the matter of **Mehraj Singh Vs. State of U.P.** reported in **1994 (5) SCC 188** while underlining the importance of FIR in Para 12 of its judgment held thus;-

> "FIR in a criminal case and particularly in a murder case is a vital and valuable piece of evidence for the purpose of appreciating the evidence led at the trial. The object of insisting upon prompt lodging of the FIR is to obtain the earliest information regarding the circumstances in which the crime was committed, including the names of the actual culprits and the parts played by them, the weapons, if any, used as also the names of the eyewitnesses, if any. Delay in lodging the FIR often results in embellishment, which is a creature of an afterthought. On account of delay, the FIR not only gets bereft of the advantage of spontaneity, danger also creeps in of the introduction of a coloured version or exaggerated story. With a view to determine whether the FIR was lodged at the time it is alleged to have been

recorded, the courts generally look for certain external checks. One of the checks is the receipt of the copy of the FIR, called a special report in a murder case, by the local Magistrate. If this report is received by the Magistrate late it can give rise to an inference that the FIR was not lodged at the time it is alleged to have been recorded, unless, of course the prosecution can offer a satisfactory explanation for the delay in dispatching or receipt of the copy of the FIR by the local Magistrate. The second external check equally important is the sending of the copy of the FIR along with the dead body and its reference in the inquest report. Even though the inquest report, prepared under Section 174 CrPC, is aimed at served a statutory function, to lend credence to the prosecution case, the details of the FIR and the gist of statements recorded during inquest proceedings get reflected in the report. The absence of those details is indicative of the fact that the prosecution story was still in an embryo state and had not been given any shape and that the FIR came to be recorded later on after due deliberations and consultations and was then ante-timed to give it colour of a promptly lodged FIR."

The Hon'ble Apex Court in the matter of **Thanedar Singh Vs. State of M.P.** reported in **(2002) 1 SCC 487** referring Paragraph 12 of the judgment in the matter of Mehraj Singh (supra) with approval that;

'the evidence of the date of sending copy of FIR to the Magistrate Court was not adduced by the prosecution inspite of being given opportunity. Crime number/FIR was not found in the inquest report, site plan or requisition sent to the hospital for the post-mortem. No reference was made in the inquest report about the information, if any, furnished by PWs. It was held that the fact cast a serious doubt on the correctness of the FIR, especially the time and date of its recording. All this would support the defence version that FIR in which the names of the accused were mentioned would have probably come into existence much later."

In the matter of **Alla China Apparao and others Vs. State of A.P.** reported in **(2002) 8 Supreme Court Cases 440**, the Hon'ble Apex Court held that;

"the delay in sending the FIR to the Magistrate forthwith, it cannot be taken, *ipso facto*, to be a ground for throwing out the prosecution case if the same is otherwise trustworthy upon appreciation of evidence which is found to be credible. However, if it is otherwise, an adverse inference may be drawn against the prosecution and the same affect the veracity of the prosecution case, more so when there are circumstances from which an inference can be drawn that there were chances of manipulation in the first information report by falsely roping in the accused persons after due deliberations."

The Hon'ble Apex Court in the matter of **Bijoy Singh and another Vs. State of Bihar** reported in **(2002) 9 Supreme Court Cases 147** has reiterated the significance of requirement to forward forthwith the copy of FIR to the Magistrate and effect of delay in sending the copy. In this judgment it has been held that;

".....Insisting upon the accused to seek an explanation of the delay is not the requirement of law. It is always for the prosecution to explain such a delay and if tendered, no adverse inference can be drawn against it. When no explanation is offered for the delay, the court to minutely examine the prosecution version for ensuring itself as to whether any innocent person has been implicated in the crime or not.

17. In the light of the discrepancies that have been pointed in recording report, and in the light of the principles of law laid down in the above mentioned judgments, the compliance of Section 157 of Cr.P.C. attains significance, however, from perusal of the record we find that the prosecution has not adduced any document to establish that copy of FIR was sent to the concerned Magistrate. We have already pointed out the discrepancies present in the prosecution case in recording First Information Report, as detailed hereinabove.

18. Considering that in the Sanha of Ex.P-28 given by complainant Vishnu (PW-6) the names of the appellants are missing. Further considering that in the FIR of Ex.P-20 only names of accused Ramanand & Shashibhusan appears and the other documents also the name of two accused persons namely Laxminarayan and Sanjay is missing the possibility of involving

innocent persons on the basis of Dehati Nalishi of Ex.P-6 cannot be ruled out.

19. Apart from the discrepancies, as pointed out, we have also observed that the crime number does find place in the inquest report, requisition for postmortem of the deceased persons and in the postmortem report also. The Hon'ble Apex Court in the matter of Mehraj Singh (supra) has adversely commented upon the fact that the number of FIR or crime number was not found in the inquest report or in the requisition for the postmortem. The fact situation is more or less the same here. Moreover, the diary statement of Ex.D-1 of Vishnu was recorded on 3.4.2000, though he was throughout present during the investigation.

20. It is not in dispute that Vishnu (PW-6) & Pawan (PW-7) are the sons of deceased and as such highly interested witnesses. It is also settled law that the conviction of the accused person can be based on the testimony of interested witnesses and it is not the requirement of law to insist for corroboration from the independent versions. However, while evaluating the deposition of the interested witnesses their versions is to be scrutinized minutely.

21. The case of the prosecution, as appearing from the charge sheet and which has been reproduced in the foregoing paragraphs, the incident occurred when deceased Vindhyachal went to the house of accused Sheshnath in inebriated condition and was challenging them. Hostile witnesses, who are residing in the vicinity of the place of incident, were in fact witness of this fact and they have stated in there respective diary statement the circumstances under which the incident occurred. However, Vishnu (PW-6) & Pawan (PW-7) have given entirely different version than that of the case of the prosecution. These two witnesses have stated that after their father was orally abused by the accused persons, he returned home and thereafter his mother went to the place of incident, she was assaulted first by the accused persons and hearing her cries his father went to the place of incident and thereafter both of the witnesses followed them. Whereas, the case of the prosecution is that Vindhyachal was first assaulted by the accused persons and after hearing his shout, wife of Vindhyachal went there, she tries to intervene and in the process she lies over her husband and thereafter she was also assaulted. Apart from this glaring inconsistency regarding the origin of offence there are material omissions and contradictions in the statement of these two witnesses with respect to the place of incident as also with respect to the fact that accused Ramanand was holding flat iron plate, as stated by

these two witnesses in their diary statement. Whereas, before the court they have denied this and Vishnu (PW-6) has stated that Shashibushan was holding iron plate and rest of the accused persons were holding danda and rod Pawan (PW-7) has stated that Shashibushan was holding iron plate and he has denied having told the police in Ex.D-2 that Ramandand was holding iron plate and he has assaulted by that iron plate.

22. Vishnu (Ex.P-6) was cited as injured eyewitness by the prosecution and his injury report is Ex.P-19, however, this witness has not stated that he was assaulted by the accused persons at the time of incident or he was sent for medical examination for the injuries sustained by him in the said incident. From perusal of the Sanha (Ex.P-28) and FIR (Ex.P-20) initially only the absconding accused Shashibhusan & Ramanand were mentioned by name in these documents by Vishnu (PW-6) and it appears that names of the appellants were subsequently added.

23. So far as the presence of blood in the weapons of offence being flat iron plate, by which accused assaulted deceased persons, and the club, which were seized on the memorandum of accused persons is concerned, as per FSL report of Ex.P-33, there is no evidence available on record that the same were stained with human blood and that too of the blood group of deceased persons.

24. Thus, in our considered opinion the testimonies of eyewitnesses Vishnu (PW-6) & Pawan (PW-7) do not inspire confidence. These witnesses have attributed assault by iron plate to the absconding accused persons. However, they have made omnibus statements about the involvement of the appellants and the appellants have been convicted in the said offence with the aid of Sections 148 & 149 of IPC. As per the case of the prosecution, the incident occurred near the house of accused persons. When the accused persons were inside the house and they were preparing meals, at that time the deceased Vindhyachal reached there in inebriated condition and challenged them. He was also smashing the tiles of the roof of the accused persons. In these circumstances, the accused persons came out of the house and started assaulting Vindhyachal and when his wife Vidhywati came to the place of incident, she was also assaulted. For the purposes of convicting the accused persons under Section 148 of IPC, the essential pre-requisite is that the assembly was unlawful as per provisions of Section 141 of IPC. Since the accused persons were inside their tenanted house and the fact that deceased Vindyachal went there and picked up the quarrel, the question of forming

unlawful assembly with the common object of murdering the deceased persons does not arise, as the incident occurred on the spur of moment. Therefore, all the named accused persons cannot be convicted with the aid of Section 149 of IPC and only those accused persons against whom specific evidence of participation in the crime are liable for conviction for their own act.

25. On the basis of aforesaid analysis we are of the considered opinion that evidence of Vishnu (PW-6) & Pawan (PW-7) does not inspire our confidence with respect to the allegation against the appellants. The prosecution has failed to prove that the appellants with a common object with two other absconding accused persons of causing death of deceased persons formed an unlawful assembly and in furtherance of the common object the deceased persons were murdered.

26. In the result, both the appeals i.e. Criminal Appeal No.573/2001 preferred by appellants Laxmi Narayan & Sanjay Kumar Pandey and Criminal Appeal No.772/2001 preferred by appellant Sheshnath Tiwari, deserve to be allowed and the same are hereby allowed. Conviction under Sections 148, 302/149 for causing death of Vidhyawati, under Section 302/149 for causing death of Vindhyachal Mishra & under Section 323/149 for causing injuries to Pawan (PW-7) and sentences imposed under those sections are hereby set aside. They are acquitted of those charges. They are in custody since 8.2.2000, therefore, they be set at liberty forthwith if not required in any other case.

**Sd/-**
**L.C.BHADOO**
**Judge**

**Sd/-**
**DHIRENDRA MISHRA**
**Judge**

Roshan/-